

## § 40.21

does not include the farming or growing of tobacco or the handling of tobacco solely for sale, shipment, or delivery to a manufacturer of tobacco products or processed tobacco, nor does the processing of tobacco include curing, baling, or packaging activities. For purposes of this definition, the processing of tobacco includes, but is not limited to, stemming (that is, removing the stem from the tobacco leaf), fermenting, threshing, cutting, or flavoring the tobacco, or otherwise combining the tobacco with non-tobacco ingredients.

**Removal or remove.** The removal of tobacco products or cigarette papers or tubes, or any processed tobacco from the factory or release from customs custody, including the smuggling of other unlawful importation of such articles into the United States.

**Roll-your-own tobacco.** Any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes or cigars, or for use as wrappers of cigars or cigarettes.

**Sale price.** The price for which large cigars are sold by the manufacturer, determined in accordance with § 40.22 and used for computation of the tax.

**Service center.** An Internal Revenue Service Center in any of the Internal Revenue regions.

**Service center director.** A director of an internal revenue service center.

**Sets.** Any collection, grouping, or packaging of cigarette papers made up by any person for delivery to the consumer as a unit.

**Small cigarettes.** Cigarettes weighing not more than three pounds per thousand.

**Small cigars.** Cigars weighing not more than three pounds per thousand.

**Smokeless tobacco.** Any snuff or chewing tobacco.

**Snuff.** Any finely cut, ground, or powdered tobacco that is not intended to be smoked.

**Special tax.** The special (occupational) tax on manufacturers of tobacco products, manufacturers of cigarette papers and tubes, and export warehouse proprietors, imposed by 26 U.S.C. 5731.

## 27 CFR Ch. I (4–1–10 Edition)

*This chapter.* Title 27, Code of Federal Regulations, chapter I (27 CFR chapter I).

*Tobacco products.* Cigars, cigarettes, smokeless tobacco, pipe tobacco, and roll-your-own tobacco.

*Treasury Account.* The Department of the Treasury's General Account at the Federal Reserve Bank of New York.

*TTB.* The Alcohol and Tobacco Tax and Trade Bureau, Department of the Treasury

*U.S.C.* The United States Code.

(26 U.S.C. 7805 (68A Stat. 917), 27 U.S.C. 205 (49 Stat. 981 as amended), (82 Stat. 959), and Sec. 38, Arms Export Control Act (90 Stat. 744) Aug. 16, 1954, ch. 736, 68A Stat. 775, as amended (26 U.S.C. 6301); June 29, 1956, ch. 462, 70 Stat. 391 (26 U.S.C. 6301))

[T.D. ATF-48, 43 FR 13553, Mar. 31, 1978]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 40.11, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

EFFECTIVE DATE NOTES: 1. By T.D. TTB-78, at 74 FR 29408, June 22, 2009, § 40.11 was amended as follows, effective June 22, 2009 through June 22, 2012.

a. By removing the words “tobacco products and cigarette papers and tubes” and adding, in their place, the words “tobacco products or cigarette papers or tubes or any processed tobacco”;

b. The definition of “Factory” is amended by adding after the words “tobacco products” the words “or processed tobacco.”;

c. New definitions of “Manufacturer of processed tobacco”, “Packaging”, and “Processed tobacco” are added in appropriate alphabetical order;

d. The definitions of “Package” and “Permit number” are revised;

e. The definition of “Removal or remove” is amended by adding after the words “tobacco products or cigarette papers or tubes” the words “, or any processed tobacco”;

f. The definition of “Roll-your-own tobacco” is amended by adding at the end before the period the words “or cigars, or for use as wrappers of cigars or cigarettes”.

2. By T.D. TTB-79, 74 FR 37419, July 28, 2009, § 40.11 was amended by adding a definition of “special tax”, effective July 28, 2009 through July 30, 2012.

## Subpart C—Taxes

### § 40.21 Cigar tax rates.

(a) Cigars are taxed at the following rates under 26 U.S.C. 5701(a):

Type and amount	Tax rate for removals during the following periods:	
	2002 to March 31, 2009	April 1, 2009 and after
Small cigars per thousand	\$1.828 .....	\$50.33
Large cigars*		
• percentage of sale price.	20.719% .....	52.750%
• but not to exceed—	\$48.75 per thousand.	\$0.4026 per cigar.

\* For large cigars: Until March 31, 2009, the percentage tax rate applies when the sale price is \$235.294 per thousand or less, and the flat tax rate applies when the sale price is more than \$235.294 per thousand. On and after April 1, 2009, the percentage tax rate applies when the sale price is \$763.222 or less per thousand cigars, and the flat tax rate applies when the sale price is more than \$763.222 per thousand cigars.

(b) See § 40.22 of this part for rules concerning determination of sale price of large cigars.

(c) Cigars not exempt from tax under 26 U.S.C. chapter 52 and the provisions of this part which are removed but not intended for sale shall be taxed at the same rate as similar cigars removed for sale.

[T.D. ATF-420, 64 FR 71939, Dec. 22, 1999, as amended by T.D. TTB-75, 74 FR 14481, Mar. 31, 2009]

#### § 40.22 Determination of sale price of large cigars.

(a) *General rule.* The tax imposed on large cigars is computed based on the sale price (the price for which the large cigars are sold by the manufacturer). In addition to money, goods or services exchanged for cigars may be considered as part of the sale price.

(b) *Special cases—(1) In general.* If there is any question concerning the applicable sale price for tax purposes, the appropriate TTB officer will determine such price, applying rules similar to the constructive sale price rules in 26 U.S.C. 4216(b) and the implementing regulations in 26 CFR 48.4216(b)–1 through 48.4216(b)–4. These constructive sale price rules apply to cigars sold by a manufacturer at retail, sold on consignment, or sold (otherwise than through an arm's length transaction) at less than the fair market price. Sales of cigars between affiliated corporations may be analyzed under the constructive sale price rules. The appropriate TTB officer may make this analysis on his or her own initiative or upon the written request of a manufacturer. If TTB decides it is necessary, we will publish constructive sale price

determinations in the TTB Bulletin in accordance with § 70.701(d) of this chapter.

(2) *Adjustments in sale price—(i) Reasons for adjustment.* Adjustments to the sale price may occur as a result of a discount or price increase by the manufacturer or as a result of an TTB determination pursuant to paragraph (b)(1) above. In either case, the manufacturer must make conforming changes to the tax that was computed on the sale price before the adjustment.

(ii) *Time of adjustment.* If an adjustment is made before the end of the same tax return period as the original determination of the tax, the adjustment may be made on the same return. If the price is increased or decreased retroactively (during a later return period), either by the manufacturer or by TTB's determination, the manufacturer must make an adjustment on the tax return for the current return period in which the price change was determined.

(iii) *Amount of adjustment.* The taxpayer must compute the adjustment to the tax as the difference between the tax that was paid and the tax that should have been paid, based on the newly determined sale price, together with interest thereon and any applicable penalties. The interest must be computed from the time of payment of the original tax until the time the adjustment was made. Upon request, the appropriate TTB officer will provide information regarding interest rates applicable to specific time periods and any applicable penalties.

(3) *Pricing for different packaging.* If different bona fide sale prices are applicable to different types of packaging (e.g., boxes of 25 and boxes of 50), then the cigars in each type of packaging are taxed on the basis of their respective sale prices.

(4) *Pricing of seconds.* If some of an otherwise identical cigar brand and size:

(i) Are distinctive from other such cigars because of physical imperfections,  
(ii) Are offered to the consumer through clear labeling as “imperfects”, “seconds”, “throw-outs”, or a comparable commonly understood term, and